

SERVED: August 25, 1992

NTSB Order No. EA-3652

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of August, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10369
v.)	
)	
THOMAS D. HITE,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Jimmy Coffman, issued on February 9, 1990, following an evidentiary hearing.¹ In that decision, the law judge affirmed the Administrator's order revoking respondent's air transport pilot certificate (and any other pilot certificates held by him). Respondent was charged with violations of Sections 135.21, 135.25(a)(2), 135.65(b), 91.31(a),

¹The initial decision, an excerpt from the hearing transcript, is attached.

and 91.9 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Parts 91 and 135.² We deny the appeal.

Respondent was the pilot of a February 4, 1989, passenger-

²The cited portions of Parts 135 and 91 provided:

§ 135.21 Manual requirements.

(a) Each certificate holder, other than one who uses only one pilot in the certificate holder's operations, shall prepare and keep current a manual setting forth the certificate holder's procedures and policies acceptable to the Administrator. This manual must be used by the certificate holder's flight, ground, and maintenance personnel in conducting its operations. . . .

§ 135.25 Aircraft requirements.

(a) Except as provided in paragraph (d) of this section, no certificate holder may operate an aircraft under this part unless that aircraft -

(2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment.

§ 135.65, Reporting mechanical irregularities.

(b) The pilot in command shall enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight time. . . .

§ 91.9 (now 91.13), Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.31, Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry. . . .

carrying Spectrum Airlines charter flight from Hyannis to Nantucket, MA. Passengers on the flight included a number of Hyannis High School basketball players and their coach. All were traveling to a game the team was to play in Nantucket. Shortly after takeoff, the aircraft (a Cessna model 402B) experienced control difficulty. The nose rose dramatically, so that the aircraft was vertical. Respondent was, however, able to gain control of the aircraft, return to Hyannis, and land it without damage to persons or property.

The Administrator charged that the behavior of the aircraft was due to respondent's misfeasance. According to the Administrator, after the passengers and baggage were loaded and respondent was aboard the aircraft, the tail soundly hit the ground. This occurred, according to the Administrator's expert, because the aircraft was improperly loaded beyond its aft center of gravity limit.

Both oral and written testimony from the coach and many of the players confirmed this allegation. According to these passengers, their weights were not requested, seats were not assigned, and baggage was not stowed in the nose, but tossed in the rear of the passenger cabin. There is no dispute in the record that these steps are necessary predicates to proper loading of this aircraft.³ These witnesses further testified

³The weights need not be requested if already available. However, it is critical that the weight of each passenger be known, so that passengers can be seated in an arrangement that ensures the proper balance of the aircraft.

that, after the aircraft's tail hit the ground, respondent did not check the controls to ensure proper functioning, took no action to reconfigure the passengers or the baggage and, in boarding another Spectrum Airlines aircraft for the trip to Nantucket immediately after respondent's aircraft returned to Hyannis, they again were not asked their weights or assigned seats. See, e.g., Tr. at 24-28, 167-185, Exhibits A-16, and 22-25.

The Administrator offered the damaged parts of the aircraft, and introduced evidence to show that (1) this tail damage was likely to have caused the loss of control, and (2) the aircraft was overweight and out of balance upon takeoff (also contributing to lack of control). See, e.g., Tr. at 139, 149, 230-250.

Respondent offered a considerably different version of events. He denied that the aircraft's tail had hit the ground. Tr. at 522. He further contended that he had loaded the baggage in the nose, and had properly positioned all passengers in accordance with the weight and balance documentation and the flight manifest provided by the carrier.⁴

The law judge found that the Administrator had proven all

⁴Respondent contended that the team members did not follow instructions and he twice had to reseat them to conform to the flight manifest. The pilot of the substitute aircraft was at the scene part of the time and confirmed that respondent had said the passengers did not follow instructions. That witness testified that he did not see the tail of respondent's aircraft hit the ground.

the violations but one,⁵ and affirmed revocation of respondent's pilot certificate(s). Overall, the law judge found more credible the statements of the passengers, and he specifically found that the tail section of the aircraft struck the ramp after the passengers and baggage were loaded, rendering the aircraft unworthy (i.e., unairworthy). The law judge further found that the aircraft was operated out of the center of gravity limits and in excess of the maximum gross takeoff weight, and that respondent did not enter or have entered in the aircraft log the flight system malfunction. The law judge concluded that operating the aircraft under these circumstances was reckless.

On appeal, respondent first contends that the law judge's factual findings are not supported by the evidence and are arbitrary and capricious. Respondent, however, fails to convince us. As we have often noted, when the decision is based, as this one is, on credibility determinations, it will not be overturned unless those assessments are proven to be arbitrary, capricious, or incredible. Administrator v. Smith, 5 NTSB 1560, 1563 (1987), and cases cited there.

The law judge did not act arbitrarily or capriciously in accepting the testimony of numerous participants in the incident.

That the individual statements of the players were not identical

⁵As noted, Section 135.21 requires compliance with the company manual. Spectrum's manual required that flight control discrepancies be reported to the Board. The law judge found no evidence that respondent failed to report the incident, and therefore dismissed this charge.

in all details is not surprising, and is not grounds to reverse.

Details sufficient to make a credibility assessment were consistent.⁶ Notwithstanding counsel's extensive argument regarding how the incident occurred, or the discussion of respondent's experience and credentials, we see no basis to disturb the law judge's credibility assessment. See Administrator v. Klock, NTSB Order EA-3045 (1989), at 4 (law judge's credibility choices "are not vulnerable to reversal on appeal simply because respondent believes that more probable explanations...were put forth"). The law judge's conclusion (Tr. at 603) that many aspects of this operation were rushed and that safety was compromised is supported in the record.

Respondent also contends that any overloading of the aircraft (which he acknowledges as possible) may not be blamed on respondent. We disagree. Although the company manual only required that respondent check weight and balance calculations and not develop the underlying data, as pilot-in-command respondent had primary responsibility for the safe operation of the aircraft, and is held to the highest degree of care. See, e.g., Administrator v. Hughes, NTSB Order EA-2866 (1989), and

⁶Thus, for example, that one player's statement did not agree with all the others as to which individual was the last to board the airplane is not a sufficient basis to disregard all the players' testimony. Respondent's other illustrations of alleged inconsistencies are similarly unconvincing. There are no significant inconsistencies among the statements the law judge credited. Instead, there are inconsistencies between the testimony of the players and respondent's version of events. Moreover, that a player's father believed an engine had failed is an irrelevancy, not an inconsistency.

Administrator v. Fay and Takacs, NTSB Order EA-3501 (1992).

Respondent knew or should have known of the tendency of this aircraft to put down on its tail. That, in itself, required respondent carefully to examine all aspects of the aircraft's tail prior to takeoff. If he had done so, he would have discovered the damage that was evident from Exhibits A-10 and 13.⁷

Finally, with regard to evidentiary sufficiency, respondent claims that the Section 135.65(b) charge is "filler." Respondent does not, however, argue that the violation was not proven. That respondent may view this violation as less serious than another is not a basis to reverse the law judge's finding.

In Part II of respondent's appeal, he raises what he terms "trial issues," none of which warrants disturbing the initial decision. We do not understand the purpose of counsel's "Air Safety Reporting System" [sic] (Aviation Safety Reporting Program) discussion, and he is incorrect in stating that, because respondent filed such a report, he is relieved of any punishment.

As the Administrator correctly responds, the finding of recklessness precludes the immunity the reporting program otherwise offers. Administrator v. Ferguson and Bastiani, 3 NTSB 3068, 3071 (1980). Further, respondent fails to show why the Administrator's failure to use his emergency powers to revoke

⁷Respondent's version of events (that the players had not obeyed seating instructions) would have made such a detailed inspection all the more compelling.

respondent's certificate(s) would invalidate his action or the law judge's decision.⁸

Respondent also claims that the proceeding was "contaminated" by evidence that respondent Hite, as a witness in another proceeding related to this incident, had pled the Fifth Amendment. The Fifth Amendment, however, is not applicable to these proceedings.⁹ In any case, the relevant testimony was not an improper means to attempt to impeach respondent's credibility.

Respondent's argument that his right to due process was denied because the law judge shortened the hearing is equally meritless. Although the law judge indicated a desire to expedite the hearing, such a desire is entirely consistent with efficient administration and need not reflect a lack of due process. The law judge also stated: "Don't worry about the time. I just want to stick to relevant matters and not get bogged down with wasting time." Tr. at 540. Moreover, as the Administrator notes, at the hearing respondent did not object when the written statements of certain proposed witnesses were used, rather than their being called to testify.¹⁰

⁸That respondent was made Spectrum's Director of Operations is irrelevant to this question. In any case, there was testimony that the FAA did not approve of this choice and that its approval was required. Tr. at 404.

⁹Roach v. NTSB, 804 F.2d 1147 (10th Cir. 1986).

¹⁰And, respondent has no standing to object to the law judge's decision that the Administrator not put the coach on the stand. The Administrator did not appeal this or any other aspect of the law judge's decision.

In Part III of his appeal, respondent claims that, because the FAA has not codified certain standards, its action here is void. Respondent also raises various constitutional issues. These arguments have consistently been rejected, both for procedural and substantive reasons. Administrator v. Rochna, NTSB Order EA-3184 (1990), aff'd. Rochna v. NTSB, 929 F.2d 13 (1st Cir. 1991); Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986); Hill v. NTSB, 886 F.2d 1275 (10th Cir. 1986); and Administrator v. Wisler, NTSB Order EA-3591 (1992).

Finally, and based on arguments we have rejected infra, respondent alleges that the sanction should be reduced from revocation to a 15-30 day suspension. We see no legitimate basis for such a reduction. See Administrator v. Muzquiz, 2 NTSB 1474 (1975).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The revocation of respondent's airline transport pilot certificate and any other pilot certificate held by him shall begin 30 days from the date of service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹¹For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).